

# Does an Ethic Independent of Halakha Remain an Autonomous Source of Obligation?

Asher Meir

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## Introduction

In the Har Etzion Yeshiva, the curriculum is overwhelmingly defined by the study of the Law, while the spirit is defined by the commitment to ethical conduct. It is only natural that the relationship between Halakha and ethics is a topic of study and concern. Are these sources of obligation overlapping, complementary, or perhaps conflicting?

In his article, “Does Jewish Tradition Recognize an Ethic Independent of Halakha?”<sup>1</sup> R. Lichtenstein answers this eponymous question in a characteristically nuanced way. R. Lichtenstein considers it beyond dispute that our tradition does recognize an ethic independent of the *halakhot*, the specific rules detailed in the law; there is a consistent recognition of and commitment to a kind of natural morality (although not necessarily to “natural law” as this term is usually used). “If the issue be reduced to natural morality in general, it need hardly be in doubt” (33).

However, such an ethic, while independent of the *halakhot*, is not independent of Halakha. R. Lichtenstein tries to demonstrate that, to a large extent, natural morality, “an ethic independent of Halakha,” is ultimately subsumed into the halakhic system through the “meta-halakha” of *lifnim mi-shurat ha-din* – going “beyond the letter of the law.” He writes: “*Lifnim mi-shurat ha-din* ... is the sphere of contextual morality” (47).

R. Lichtenstein’s article, as I read it, implies that all moral conduct acquires the status of commandment through this process of subsumption; moral obligations *per se* are superseded by a Torah commandment to act ethically. In this article, I will present some evidence that the scope of *lifnim mi-shurat ha-din* is considerably less than the scope of the natural or contextual morality affirmed by Jewish tradition. Other halakhic meta-obligations are of similarly limited scope. At the same time, it is clear that Judaism never repudiated the principles of natural morality. It follows that Judaism recognizes an ethic truly independent of Halakha, one that is not subsumed under any other halakhic category.

## Natural Morality and *Matan Torah*

A frank acknowledgment of the fundamental importance of natural morality is at the heart of R. Lichtenstein’s essay. In the first few pages, he marshals Mishna, Midrash, and prominent *Rishonim* to establish that “tradition accords a non-halakhic

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<sup>1</sup> First printed in Marvin Fox (ed.), *Modern Jewish Ethics* (Columbus, 1975), 62-88; reprinted in Menachem Kellner (ed.), *Contemporary Jewish Ethics* (New York, 1978), 102-123, and in R. Lichtenstein’s *Leaves of Faith*, vol. 2 (Jersey City, 2004), 33-56; translated into Hebrew in *De’ot* 46 (5737), 5-20. Page references in this article will be to *Leaves of Faith*.

ethic some theoretical standing by acknowledging its universal validity and provenance” (35) – certainly a far-reaching statement.

However, the impressive standing of natural morality immediately encounters a surprising obstacle: *matan Torah*. R. Lichtenstein wonders whether, subsequent to the giving of the Torah, “that standing is of any practical significance to us” (36).

The significance of this ethic is not challenged with abrogation; the article asserts that “natural morality establishes a standard below which the demands of revelation could not possibly fall” (36).<sup>2</sup> The threat is rather from supersession; perhaps “the demands or guidelines of Halakha are both so definitive and so comprehensive as to preclude the necessity for – and therefore, in a sense, the legitimacy of – any other ethic” (37). In other words, “Essentially, then, the question is whether Halakha is self-sufficient” (38).

This question in turn has a naïve and a more sophisticated formulation. The naïve version asserts that every ethical dilemma is adequately resolved by some specific law in the canon, while the more sophisticated version allows for a kind of meta-halakha directing us to act ethically. The naïve version is promptly negated: “If we mean that everything can be looked up, every moral dilemma resolved by reference to code or canon, the notion is both palpably naïve and patently false” (38). The evidence in favor of this position begins with everyday experience: “Who has not found that the fulfillment of explicit halakhic duty could fall well short of exhausting clearly felt moral responsibility?” (39).

Afterwards, we find various citations from the Talmud, including the statement that “Jerusalem was destroyed because they [its inhabitants] judged [in accordance with] Torah law... and did not act *lifnim mi-shurat ha-din*” (39). One very important proof-text is from Nachmanides’ commentary on the Torah, wherein he insists that doing “the right and the good” requires going beyond the strict letter of the law.

This insight, however, only establishes that the *halakhot*, the set of individual rules or *dinim*, are not self-sufficient. R. Lichtenstein goes on to demonstrate that the halakhic system itself extends beyond the narrow ambit of such *dinim*. The individual *halakhot* are extended and amplified by the principle of *lifnim mi-shurat ha-din*, “beyond the letter of the law,” which is itself a part of the halakhic system. “The demand, or, if you will, the impetus for transcending the *din* is itself part of the halakhic corpus. This point emerges clearly from the primary rabbinic source for the concept of *lifnim mi-shurat ha-din*” (40).

So far, we have established that the set of particular laws are inadequate to supersede an independent system of natural morality, and we have also established that Halakha as an ethical system extends beyond the domain of the particular laws. But a critical question remains: how far does the halakhic system, in fact, extend? Is it far enough to make natural morality superfluous as an autonomous source of obligation?

### **The Penumbra of the *Mitzvot***

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<sup>2</sup> Similarly, in the appendix to chapter 1 of *By His Light: Character and Values in the Service of God*, ed. R. Ziegler (Jersey City, 2003), R. Lichtenstein explains that “one can regard Torah not as a totally new chapter in human history, but rather as the pinnacle of the earlier development.”

The precise scope of *lifnim mi-shurat ha-din* is examined in detail towards the end of the article. There, R. Lichtenstein enumerates a number of ways in which *lifnim mi-shurat ha-din* extends the law. “One of its principal modes entails the extension of individual *dinim* by (1) refusal to avail oneself of personal exemptions; (2) disregard of technicalities when they exclude from a law situations that morally and substantively are clearly governed by it; and (3) enlarging the scope of the law by applying it to circumstances beyond its legal pale but nevertheless sufficiently similar to share a specific *telos*.” He then describes these three extensions as “the penumbra of *mitzvot*” (50).<sup>3</sup>

For the sake of completeness, it is worthwhile to provide examples of each of these categories.

(1) *Refusal to avail oneself of personal exemptions*: This characterizes the *lifnim mi-shurat ha-din* conduct attributed to R. Chiya in *Bava Kama* 99b. While a person who renders professional judgment can generally be held liable for a mistake, there is an exception for an experienced and certified professional. Such a practitioner is exempt because his decision is presumed to be judgment, not misjudgment, and his mistake, in effect, bad luck. Nevertheless, R. Chiya decided to reimburse the customer and thus refused to avail himself of this exemption.

Another example of this category is found in *Bava Metzia* 30b. While fundamentally every Jew is obligated to return a lost object, there is an exemption if returning it is beneath the dignity of the finder; even if the object was his own, he would hire someone to take care of it rather than doing so himself. Nevertheless, R. Yishmael ben R. Yossi acted *lifnim mi-shurat ha-din* and declined to avail himself of this exemption.

(2) *Disregard of technicalities*: The *gemara* describes that if a lost object is found after the owner despairs of ever getting it back, the finder may keep it (*Bava Metzia* 24b). In most cases, however, we cannot actually determine if there is despair – after all, if the owner was known, the object would not be considered lost in the first place. Thus, Halakha provides for “constructive despair;” certain circumstances permit the finder to presume that the owner has despaired. If, however, we can actually locate the owner and know that he is still looking for the object, this legal construction is a mere technicality. For this reason, Shmuel prescribes returning the object in this situation *lifnim mi-shurat ha-din*.

(3) *Similar telos*: Any sale can be reversed if it can be demonstrated that there was a lack of sufficient intention on the part of the seller. This would be true if there was an explicit condition on the sale, but the same purpose is arguably achieved if the buyer is convinced that under the circumstances that developed the seller would never have agreed to the sale. Thus, R. Pappa agrees to reverse a sale when the seller sold his field only because of an urgent need for ready cash, but later obtained the cash

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<sup>3</sup> Professor Shmuel Shilo, in his article “On One Aspect of Law and Morals in Jewish Law: *Lifnim Mi-Shurat Ha-Din*,” *Israel Law Review* 13:3 (July 1978), suggests that only the first category applies: the principle applies only to a general obligation to which there is an exception. *Lifnim mi-shurat ha-din* behavior implies waiving the exemption and acting in accordance with the original universal rule. The difference in approach is primarily semantic; Prof. Shilo would consider an exemption due to a technicality or to a lack of precise conformity to the legal category as an exception. I consider R. Lichtenstein’s categorization more informative.

elsewhere. The *gemara* (*Ketuvot* 97b) first terms this *lifnim mi-shurat ha-din*.<sup>4</sup> This would also characterize the *lifnim mi-shurat ha-din* conduct of R. Pappa in *Berakhot* 45b. The formal *halakha* is that if two people want to recite the Grace after Meals, the third must briefly interrupt his meal to allow them to make a *zimmun*, but if one wants to make the blessing, two do not have to pause on his behalf. When R. Pappa interrupted his meal for a single person, he evidently understood that the underlying principle is that one should be willing to interrupt the meal to form a *zimmun* whenever it is not too much trouble.

### **Beyond the Penumbra?**

Having established that *lifnim mi-shurat ha-din* extends Halakha beyond the specific requirement of the *dinim* to include the shadow that they cast, we may now ask: does the principle also go beyond that to constitute a general legal obligation of ethical conduct? Or does it remain limited to the specific laws and their extensions?

The first possibility is certainly plausible. There are precedents for the halakhic system having explicit reference to extra-halakhic standards. An instructive parallel to the kind of “halakhic subsumption” described would be the commandment to give life-saving medical treatment. The *mitzva* of *pikuach nefesh* is so important that it takes precedence over almost all other commandments. However, the exact practices that conquer disease are seldom set out in the Halakha; rather, the Halakha refers us to the physicians. When the *Shulchan Arukh* sets out to define what actions are considered life-saving, it tells us to follow the guidance of a “competent physician” (*rofeh baki*).<sup>5</sup> The practical content of the commandment is thus: “Follow the best medical instructions of the physicians.”

So the first approach basically suggests a commandment of *lifnim mi-shurat ha-din* whose practical content is: “Follow the best ethical instructions of natural morality.” Like *pikuach nefesh*, *lifnim mi-shurat ha-din* is conceived as an imperative within Halakha whose specific parameters are to be sought outside of it.

The second approach suggests a much more specific relationship between a particular *din* and the ethical obligation imposed by *lifnim mi-shurat ha-din*. We start with a particular *din*, a specific rule, and then go beyond it, in the specific direction adumbrated by the original rule. The ethical system may also include additional directives of the Sages, which are also native to the halakhic system.

We can illustrate the distinction using well-known concepts from secular law. In secular law, we are familiar with two distinct kinds of ethical conflicts. One is the conflict between law and equity. Law is meant to deal with generalities, but in some particulars it may do a poor job of enforcing justice. In this case, judges have a degree of latitude to rule according to equity, extra-legal rules which may be quite foreign to the specific law that would formally apply. This would describe the first approach.

A distinct conflict is that between the letter and the spirit of a law. Here we have in mind quite a different problem. In this case, the law formally meant to apply a guiding principle adequate for judging the case at hand, but the specific wording of the statute doesn’t apply it adequately. This would apply to the second approach.<sup>6</sup>

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<sup>4</sup> Ultimately, the *gemara* concludes that R. Pappa’s act was obligatory and not *lifnim mi-shurat ha-din* at all, but here we are only interested in understanding the way the expression is used.

<sup>5</sup> *Shulchan Arukh, Orach Chaim* 618:1.

<sup>6</sup> A ready parallel from the *beit midrash* would be the two approaches in the *Rishonim* to the prohibition of *chatzi shiur*, less than the designated measure of a transgression. Is this

The Ramban's understanding of *lifnim mi-shurat ha-din* is subject to either interpretation. In his Torah commentary on the verse "And you shall do what is upright and good in the eyes of the Lord" (*Devarim* 6:18), the Ramban identifies this *mitzva* with the obligation to act *lifnim mi-shurat ha-din*.

For it is impossible to mention in the Torah all of a person's actions toward his neighbors and acquaintances, all of his commercial activities, and all social and political institutions. So after He had mentioned many of them, such as "thou shalt not go about as a tale-bearer," "thou shalt not take vengeance or bear a grudge," "thou shalt not stand idly by the blood of thy fellow," "thou shalt not curse the deaf," "thou shalt rise up before age," and the like, He resumes to say generally that one should do the good and the right in all matters... even what is said "His teaching is comely and his speech is gentle with others," until he will be considered whole-hearted and straight in every matter (40).

The Ramban's mention of gentle speech, which is not naturally connected with any specific commandment, and the description of being "whole-hearted and straight in every matter" suggest the first approach: the commandment to do what is "upright and good" is a general obligation of ethical conduct.

But the Ramban's description of how the Torah first mentions specifics and afterwards "resumes" to speak generally suggests a process of extrapolation, the second approach. A similar understanding was expressed by David Shatz, who wrote: "The Ramban's model is extrapolation from explicit rules, not appeal to something outside."<sup>7</sup> I understand the Ramban's parallel explanation of the commandment "You shall be holy" (*Vayikra* 19:2), with its similar specific/general structure, in a similar fashion; we are meant to define holiness within the parameters set out by the commandments.

Each understanding has its own consequences for the possibility of the principle of *lifnim mi-shurat ha-din* superseding natural morality as a source of obligation. In the first approach, the supersession is automatic; what was previously "natural" is now subsumed wholesale into the legal. According to the second approach, supersession is possible only if the penumbrae extend to all ethical challenges. That is, if we take the letter of the law, there remains some unethical conduct that has not been prohibited, but once we include the spirit of the law we encompass all relevant ethical obligations. R. Lichtenstein explicitly rejects this possibility; after describing the penumbra he writes, "Not all supra-legal conduct bears this character" (50).

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prohibition a single overarching prohibition – in addition to the myriad prohibitions on a full measure, is there an additional prohibition on a small measure of anything? Or does each of the individual prohibitions encompass two levels – the full prohibition of a full measure, as well as a lesser prohibition of a smaller amount? See the Ramban's commentary to *Yoma* 83b. I would liken the first approach to the first understanding: *lifnim mi-shurat ha-din* is a separate, overarching prohibition to act ethically. The second approach corresponds to the second understanding; each *din* has two levels, *din* and *lifnim mi-shurat ha-din*. This parallel is imperfect because, even assuming there is a separate prohibition on a *chatzi shiur*, it still applies only in those instances where an explicit full-*shiur* prohibition exists.

<sup>7</sup> David Shatz, "Beyond Obedience: Walter Wurzbarger's *Ethics of Responsibility*," *Tradition* 30:2 (1996), 79.

If, according to the second approach, *lifnim* is limited to the penumbra, then what happens to those ethical obligations beyond the penumbra? They must either stop being obligatory subsequent to *matan Torah* or remain as strictly extra-halakhic sources of obligation. R. Lichtenstein does not give credence to the former position, asserting that natural morality is “incorporated as a floor for halakhic ethic” (37).

### **The Scope of *Lifnim***

We have seen that there are two possible ways of understanding the principle of *lifnim mi-shurat ha-din*: either it incorporates all of natural morality or it extends merely to the penumbra of *mitzvot*, in which case the rest of natural morality remains extra-halakhic. I find that the general thrust of R. Lichtenstein’s article supports the first possibility, while the sources marshaled support the second.

One basis for my understanding that the literary direction of the article is to view *lifnim mi-shurat ha-din* as applying to ethical standards totally outside of Halakha (that is, *lifnim mi-shurat ha-din* incorporates *all* of natural morality, not just the penumbra of *mitzvot*) is the title of the essay, which refers to “an ethic independent of Halakha” and not “an ethic beyond Halakha.” Later on in the essay, the terms “independent ethic” and “supralegal ethic” seem to me to be used interchangeably.<sup>8</sup> In one place, R. Lichtenstein specifically refers to the ethic in question as a “nonhalakhic ethic.” (35)

Another indication is the opening of the essay, in which R. Lichtenstein takes pains to show that the Sages acknowledged natural morality in a far-reaching fashion, as opposed to merely showing that there are some areas of right conduct that require ethical sensitivity.

Most explicitly, R. Lichtenstein asserts towards the end of the essay that supralegal conduct may “aspire to attainments discontinuous with any specific practical norm.”

By contrast, I think the sources provided in the article lend support for the concept of *lifnim mi-shurat ha-din* as essentially a native halakhic ethic, an extrapolation of the *din* rather than a supplement to it – precisely what the article describes as the “penumbra of *mitzvot*” (50).

The first argument for this suggestion is based on the scope of the explicit mentions of the principle. The five cases brought above as examples of the penumbra exhaust all specific examples of *lifnim mi-shurat ha-din* mentioned in the Talmud; there seems to be no evidence justifying extending the principle beyond them.

The second argument is linguistic. The phrase “*lifnim mi-shurat ha-din*,” literally “within the boundary of the law,” translates much more readily as “beyond the letter of the law” than it does as “equity.” It readily suggests taking the law itself and extrapolating beyond its formal boundary – much as the Ramban describes in the cited passage.

### ***Imitatio Dei***

It would be unfair to question R. Lichtenstein’s conclusion solely on the basis of a narrow discussion of *lifnim mi-shurat ha-din*. R. Lichtenstein explicitly states that the topic of the article is not *lifnim mi-shurat ha-din* per se, but rather the question of whether ethical obligations are subsumed into Halakha. In particular, the article itself

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<sup>8</sup> See, for example, p. 43.

allows the possibility that according to the Rambam, the operative legal principle for expansive ethical obligations is not *lifnim mi-shurat ha-din* but rather *imitatio Dei*; it is not learned from the verse “and you shall do what is upright and good” but rather from the verse “and go in His ways” (*Devarim* 28:9) (42).

However, I would express the same reservation here as I stated regarding *lifnim mi-shurat ha-din*. The principle of *imitatio Dei* in Chazal is limited to broad statements of character development and specific acts of kindness: “Just as He is merciful and clement, so should you be merciful and clement” (*Shabbat* 133b). “Just as he clothes the naked... so should you clothe the naked; the Holy One blessed be He visits the sick... so should you visit the sick; the Holy One blessed be He consoles the mourning... so should you console mourners; the Holy One blessed be He buries the dead... so should you bury the dead” (*Sota* 14a). The Rambam in *Sefer haMitzvot* (positive commandment 8) similarly seems to relate this commandment to the cultivation of specific character traits, rather than a commandment to adopt specific principles in the face of ethical dilemmas. Thus, I find little evidence that *imitatio Dei* constitutes an overarching commandment of ethical conduct.

An additional reservation relates to R. Lichtenstein's requirement that in order to be operative, a halakhic ethic must have been commanded or subsumed with the giving of the Torah. It must belong to what he calls the “post-Sinai order” (36). We should consider the possibility that *imitatio Dei* specifically is relevant even without revelation; perhaps all mankind are inherently bidden to go in the ways of the Creator, insofar as all are created in His image.

If natural morality is not subsumed into Halakha via *lifnim mi-shurat ha-din* or *imitatio Dei*, then how is it subsumed? One possibility is through rabbinic legislation. However, the sources mentioned in R. Lichtenstein's article seem to support a similarly limited scope for these additions to the *dinim*. One prominent reference to rabbinic legislation is R. Lichtenstein's quote from the *Maggid Mishneh*, who states that the “Rabbis set down some relevant details subsumed under these principles” (49). This quote does not seem to invite a wholesale importation of an extra-halakhic ethic, but rather the inclusion of specific principles enumerated by the Sages.

This would certainly apply to “*kofin al middat Sedom*,” coercion in cases of “inordinate privatism” (45). Such instances of privatism are easily characterized as “standing on technicalities.” Property rights were meant to secure rights of enjoyment to their owners, not to deny enjoyment to others, which is what *middat Sedom* generally involves. R. Lichtenstein acknowledges that the principle of *kofin al middat Sedom* comes only to “fill in a moral lacuna at a lower level.”<sup>9</sup>

### **Ethical Obligations That Remain Beyond the Penumbra**

I am much more inclined to think that large swathes of natural morality remain outside not only the *halakhot* themselves but also beyond what is included by *lifnim mi-shurat ha-din* or alternative legal categories. Let me provide two examples.

The first example is referred to in R. Lichtenstein's essay. Avraham Avinu was horrified and indignant at the thought that God might indiscriminately judge the innocent and the wicked together in the overthrow of Sodom. His argument – “Shall

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<sup>9</sup> R. Lichtenstein wrote a separate article on this topic, “*Le-Veirur ‘Kofin al Middat Sedom*,” in *Hagut Ivrit Be-America* I (1972), 362-82. An English translation appeared in *Alei Etzion* 16 (Iyar 5769), 31-71.

then the Judge of the whole earth not do justice?” – indeed “assumes the existence of an unlegislated justice” (34).

Was this ethical principle subsequently subsumed into Halakha at Mount Sinai? Was Moshe effectively commanded and required to intervene with God on behalf of the Jewish people after the sin of the calf and at other times? Is it even logically consistent to conceive of a legal commandment to argue with the Giver of the Law? I don’t think so. Surely Moshe was driven by the same ethical urge that motivated Avraham, only with even greater intensity, for Moshe never relented as Avraham did.<sup>10</sup> Indeed, Jewish history presents a distinguished history of righteous people arguing with God, including the famous stories of Choni Ha-Me’agel and R. Levi Yitzchak of Berditchev.

The second example is the requirement to adhere to agreements. It is impossible that this requirement should originate in the Torah for the simple reason that our obligation to keep the Torah originates in it. The *gemara* (*Shabbat* 88a) asserts not only that the obligation to keep the Torah results from Israel’s voluntary agreement to the covenant, it further states that the original covenant at Mount Sinai could, in fact, have been abrogated since there was a lack of true informed consent, insofar as God’s threat to destroy them if they refused constituted duress. The covenant only became irrevocable when “they accepted it again in the time of Achashverosh.” Evidently, at least this aspect of natural morality must persist as an autonomous source of ethical obligation.

Note that the conclusion that vestiges of natural morality remain binding outside the halakhic system does not have any direct bearing on what their weight is, as R. Lichtenstein has noted elsewhere.<sup>11</sup> His position, as I understand it, is that while ethical considerations make their way into *pesak* in a variety of ways (including *lifnim mi-shurat ha-din* and *darkhei no’am*), when there is an unambiguous halakhic obligation, it must take precedence over ethical norms. For R. Lichtenstein, this is a central message of the *akeida*.

## Conclusion

Ultimately, my disagreement with R. Lichtenstein’s article is quite narrow. The evidence is compelling that *Chazal* acknowledge the “universal validity and provenance” of natural law prior to *matan Torah*. It is equally clear that the laws of the Torah narrowly and technically interpreted fall short of this standard. The article certainly makes a convincing case that there is a specifically halakhic requirement to go beyond the strict letter of the law and act according to the dictates of a supralegal contextual ethic. The disagreement is narrowly focused on the scope of this supralegal extension.

If we insist on the “integration within Halakha” (50) of supralegal conduct, this limits us to two possibilities: either the entire scope of natural law has now been subsumed into *lifnim mi-shurat ha-din* (or some equivalent supralegal principle incorporated into the law) or it has ceased to bind us at all, leaving us only with a rather narrower set of ethical obligations that have been subsumed into Halakha. R. Lichtenstein’s article defends the first interpretation, but I disagree with both. The scope of ethical obligations subsumed into Halakha via *lifnim mi-shurat ha-din*,

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<sup>10</sup> Cf. *Zohar*, *Vayera* I:106a, which makes this comparison.

<sup>11</sup> See, for example, “Being Frum and Being Good: On the Relationship between Religion and Morality,” in *By His Light*, 123.



*imitatio Dei*, or through any other principle, is broad, but not nearly as broad as the natural morality recognized by our tradition. The original logic of natural morality as a whole did not somehow disappear with the giving of the Torah, and it continues to motivate us on a non-halakhic level as a complement to Halakha.

Jewish tradition does recognize an ethic independent of Halakha, as it also recognizes that Halakha extends beyond the narrow ambit of *din*, but we fall short of subsuming natural morality into Halakha. The tension between ethics and Halakha remains, sometimes enervating and sometimes energizing. I think that many students of the Yeshiva feel that sensitivity to this tension is one of the most important educational goals of our *beit midrash*.